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4. Trial (§ 250\*)—Instructions—Requests—Abstract Instructions.—Instructions consisting of abstract propositions of law which were immaterial were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\* 7 Va.-W. Va. Enc. Dig. 720.]

Error to Corporation Court of City of Danville.

Action by the Lewis Shoe Company against Lucy E. Dudley. Judgment for plaintiff, and defendant brings error. Reversed.

*R. W. Peatross and Harris & Harris*, for plaintiff in error.

*Julian Meade*, for defendant in error.

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BETTMAN *v.* SKINNER.

Jan. 18, 1912.

[73 S. E. 436.]

1. Trial (§ 260\*)—Instructions Covered by Others.—In an action for injuries by falling from a stepladder, the court instructed that it was the duty of defendant to provide plaintiff with a reasonably safe stepladder with which to perform his work. Held, that the omission of the qualification, that defendant's duty was "to use ordinary care" so to do, is not material where the omitted matter is fully covered by an instruction given by request of defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\* 1 Va. W. Va. Enc. Dig. 605; 7 Va.-W. Va. Enc. Dig. 745.]

2. Appeal and Error (§ 263\*)—Necessity of Exception—Instructions.—Omission in instruction cannot be urged on appeal where no exception was taken on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.\* 1 Va.-W. Va. Enc. Dig. 563.]

3. Master and Servant (§ 293\*)—Conflicting Instructions.—In an action for injuries to a servant by a fall from a defective stepladder, an instruction that it was the duty of defendant to provide plaintiff with a reasonably safe stepladder, and that plaintiff, in the absence of notice to the contrary, had the right to rely on the performance of that duty by the defendant. At the instance of defendant, the court instructed that the jury must believe that the stepladder was defective; that defendant knew or ought to have known of the defect; that plaintiff did not know of it or, by the exercise of ordinary care, could not have known of it, and that although the stepladder was furnished to plaintiff by defendant with knowledge that it was unsafe and by reason thereof, plaintiff sustained the injury complained of, yet they must find for defendant, if the defects were ob-

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

vious or were known or by the exercise of reasonable care could have been known by plaintiff. Held, that plaintiff's instruction is not in conflict with defendant's instructions, but that the latter qualified it so as to meet defendant's view of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.\* 9 Va.-W. Va. Enc. Dig. 674, 680.]

**4. Appeal and Error (§ 172\*)—Necessity of Objections—Admission of Evidence.**—An objection to an instruction which allowed the jury to award damages for loss of wages, doctor's bill and hospital expenses, under a declaration which claimed only general damages, cannot be urged on appeal where defendant, without objection, allowed evidence upon all these matters to be introduced, as defendant could have called for a bill of particulars, under Code 1904, § 3249, or an amendment of the declaration would have been permissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1078; Dec. Dig. § 172.\* 1 Va.-W. Va. Enc. Dig. 560.]

**5. Trial (§ 59\*)—Appeal and Error (§ 970\*)—Order of Introducing Evidence—Discretion of Court.**—The order of introducing evidence is always a matter largely in the discretion of the trial court, and affords no ground for reversal where the exercise of such discretion does not operate to the prejudice of appellant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-142; Dec. Dig. § 59;\* Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\* 10 Va.-W. Va. Enc. Dig. 597.]

**6. Damages (§ 132\*)—Excessive Damages—Physical Injuries.**—Where a fall from a stepladder results in compound fracture of the lower portions of both bones of one leg and the injury is permanent and suppuration resulted, and a second operation was necessary to remove fragments of bone, and it was with difficulty that amputation of the leg was avoided, and the doctor's bill and hospital expenses at the time of the trial amount to \$357, a judgment for \$750 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.\* 4 Va.-W. Va. Enc. Dig. 206.]

Error to Law and Chancery Court of City of Norfolk.

Action by John L. Skinner against M. L. Bettman, for injuries received from falling from a stepladder. Under defendant's first instruction, the jury were told that in order to find for plaintiff, they must believe from the evidence that the stepladder was defective; that defendant knew or ought to have known of the defect; that plaintiff did not know of it or by the exercise of ordinary care, could not have known of it and that the injury

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

resulted in spite of ordinary care on the part of defendant. Under defendant's second instruction, the jury were told that although they believe from the evidence that the stepladder was furnished to plaintiff by defendant with the knowledge on the part of defendant that it was defective, and by reason thereof plaintiff sustained the injury complained of, yet they must find for defendant if they believe from the evidence that the defects were open or obvious or were such that were known or by the exercise of reasonable care, could have been known by plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

*A. B. Seldner*, for plaintiff in error.

*J. Edward Cole*, for defendant in error.

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BUTLER BROS.-HOFF CO., Inc., *v.* VIRGINIAN RY. C., Inc.

Jan 18, 1912.

[73 S. E. 441.]

**1. Contracts (§ 170\*)—Construction by Parties.**—In construing a contract, the court may look to the construction which the parties themselves have placed upon it in its execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

**2. Contracts (§ 170\*)—Construction—Construction of Contract by Parties—Acquiescence.**—A railroad construction contract provided compensation ranging from 27 cents per cubic yard for "earth," to \$3 per cubic yard for "excavation in water," which the contract defined as foundation pits under water and the deepening of channels in running water. The railroad's engineer, on whose estimates and certificates of the work done the contractor was paid, at no time during the work classified any of it as excavation in water, nor the contractor ever claimed that any part of this work should be so classified, but during the work he concluded that it was excavation in water and intended upon completion to assert a claim for compensation on that classification, although no notice of this determination was given to the railway. Held, in the contractors' action for such further compensation, that the meaning of the term as used in the contract was doubtful, and the court would resort to the construction given to the contract by the parties, but that the contractor's undisclosed conclusion would not be considered, and that, as the contractor by his acquiescence had placed the same construction on the contract as the railway's engineer, that construction would prevail, so that there could be no recovery.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.